

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-23

Date issued: July 28, 1994

Requested by: Ronald G. Splitt, LaMoure County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a county social service board member who is moving out of the county and who will no longer have a home or residence in the county may remain on the county social service board until the expiration of his term.

II.

Whether the county social service board member may be reimbursed for mileage from the new residence outside the county or only from the member's former residence inside the county.

ATTORNEY GENERAL'S OPINIONS

I.

It is my opinion that a county social service board member who is moving out of the county and who will no longer have a home or residence in the county may not remain on the county social service board until the expiration of his term, unless he remains a legal resident of the county under N.D.C.C. ? 54-01-26, or unless he is serving as a county social service board member in another county as provided in N.D.C.C. ? 11-10-04.

II.

It is my further opinion that if the county social service board has determined that its legally qualified members will be reimbursed for travel from their residences to the meeting place, then all members must be reimbursed for such travel, regardless of where the member's physical residence is located.

ANALYSES

I.

Each county is required to establish a county social service board. N.D.C.C. ? 50-01-07. Members are appointed by the board of county commissioners. N.D.C.C. ? 50-01-07. No state statute specifically addresses the residency of county social service board members. The general law governing county officers provides:

Officer must be qualified elector - Exceptions.

Except as otherwise specifically provided by the laws of this state, a county officer must be a qualified elector in the county in which the person is chosen or appointed Two or more counties may appoint one person to fill the same office in each county and the person filling the office must be a qualified elector of one of the counties.

N.D.C.C. ? 11-10-04. To determine whether N.D.C.C. ? 11-10-04 applies to county social service board members, it must be determined whether a county social service board member is a county officer.

To determine whether a person is an officer, the North Dakota Supreme Court considers whether an individual holds the position by election or appointment, is paid from public funds, and performs duties of a continuous nature which are defined by statute and which are related to the administration of state government. Holmgren v. N.D. Workers Comp. Bur., 455 N.W.2d 200, 202-204 (N.D. 1990). The Court also considers the importance, dignity, and independence of the position. Id. at 204-205.

These considerations may be applied to county social service board members. County social service board members are appointed by the county commission. N.D.C.C. ? 50-01-07. They receive a per diem plus reimbursement for expenses incurred in the performance of their official duties and mileage for necessary travel from the county. N.D.C.C. ? 50-01-08. The fact that the per diem is small, only \$35 per day, is not significant. Holmgren, 455 N.W.2d at 203 (jurors compensated at \$25 per day are public officers). The requirement that the duties of the position be of a continuous nature "means that the office itself has some permanence and continuity. . . ." Holmgren, 455 N.W.2d at 203. The members of the county social service board serve for a term of three

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years. N.D.C.C. ? 50-01-08. The duties of the county social service board are provided by statute. See N.D.C.C. ? 50-01-09. These duties include supervising and directing all relief and welfare activities conducted by the county, and supervising and administering relief and welfare activities in the county which are sponsored by the State Department of Human Services. N.D.C.C. ? 50-01-09. Therefore, the duties of the county social service board are of a continuous nature, they are defined by statute, and they are related to the administration of state government.

Considering the analysis in the foregoing paragraph, along with the importance, dignity, and independence of county social service board members, I conclude that county social service board members are officers. Cf. 1993 N.D. Op. Att'y Gen. L-85 (county weed board members are officers). Thus, N.D.C.C. ? 11-10-04 applies to county social service board members.

N.D.C.C. ? 11-10-04 states that, unless the laws of this state provide otherwise, "a county officer must be a qualified elector in the county in which the person is chosen or appointed." A qualified elector means a citizen of the United States who is at least 18 years old and who is a North Dakota resident. N.D. Const. art. II, ? 1. It is my opinion that the requirement in N.D.C.C. ? 11-10-04 that a county officer must be a qualified elector "in the county", means that the officer must be a resident of the county, as well as meet the necessary requirements to be a qualified elector as provided in Article II, Section 1 of the North Dakota Constitution. Whether a county officer who moves out of the county remains a resident of that county, must be determined by reviewing state law and North Dakota Supreme Court opinions.

State law provides:

54-01-26. Residence - Rules for determining.

Every person has in law a residence. In determining the place of residence, the following rules must be observed:

1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.
2. There can be only one residence.
3. A residence cannot be lost until another is gained.
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7. The residence can be changed only by the union of act and intent.

N.D.C.C. ? 54-01-26. "Every person has only one legal residence or domicile, as distinguished from the possibility of several actual physical residences." B.R.T. v. Executive Director of S.S. Bd. N.D., 391 N.W.2d 594, 598 (N.D. 1986). Determination of one's legal residence is a question of fact. Id. "A legal residence is the place where an individual has established his home, where he is habitually present, and which he intends to return to when he is away for business or pleasure." Dietz v. City of Medora, 333 N.W.2d 702, 705 (N.D. 1983).

Three elements must be proven in order to show a change of legal residence: "(1) abandonment of the old domicile, (2) actual removal to a new domicile, and (3) intent to change from the old to the new and to remain at the new domicile." Dietz, 333 N.W.2d at 705. Relevant evidence may include an individual's declaration of intent, payment of taxes, licenses, business connections, property ownership, burial plans, church membership and membership in clubs. Id. Also important is whether an individual has retained a dwelling place in the locality in question to show that the individual intended to return to that locality and thus was not abandoning legal residence there. Id. Because a residence can only be changed by the union of act and intent, N.D.C.C. ? 54-01-26(7), it is possible for a person to maintain his or her legal residence by intending to return despite living at another location for purposes of labor or employment. Habberstad v. Habberstad, 444 N.W.2d 703, 705 (N.D. 1989). However, the North Dakota Supreme Court has also stated:

[T]he intention must be accompanied by acts in harmony with the declared intention, and, notwithstanding one may testify that his intention . . . [is that] his home [is] in a certain place, if his acts are of a character to negative his declaration or inconsistent with it, it is clear that the court cannot be governed by his testimony as to intention.

State v. Moodie, 258 N.W. 558, 563 (N.D. 1935).

Because the determination of one's residence is a question of fact, it would be inappropriate for this office to determine whether the social service board member in question is or is not a resident of LaMoure County. Other North Dakota Supreme Court cases which may be helpful in determining one's

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residency are: Nelson v. Gass, 146 N.W. 537 (N.D. 1914); Burke County v. Oakland, 217 N.W. 643 (N.D. 1927); Northwestern Mortgage & Security Company v. Nowell Construction Company, 300 N.W. 28 (N.D. 1941); Schillerstrom v. Schillerstrom, 32 N.W.2d 106 (N.D. 1948); Wehrung v. Ideal School District No. 10, 78 N.W.2d 68 (N.D. 1956); Middlestead v. Bender, 210 N.W.2d 89 (N.D. 1973); and Burshiem v. Burshiem, 483 N.W.2d 175 (N.D. 1992). This listing is not intended to encompass all North Dakota Supreme Court cases addressing the issue of residency.

N.D.C.C. ? 11-10-04 authorizes two or more counties to appoint one person to fill the same office in each county. That person need only be a qualified elector of one of the counties. N.D.C.C. ? 11-10-04. In other words, that person must be a resident of one of the counties, as well as meet the necessary requirements to be a qualified elector as provided in Article II, Section 1 of the North Dakota Constitution.

In conclusion, it is my opinion that a county social board member who is moving out of the county and who will no longer have a home or residence in the county may not remain on the county social service board until the expiration of his term, unless he remains a legal resident of the county under N.D.C.C. ? 54-01-26, or unless he is serving as a county social service board member in another county as provided in N.D.C.C. ? 11-10-04.

II.

Your second question concerns reimbursement for mileage. Members of the county social service board "must be reimbursed by the county for expenses actually incurred in the performance of their official duties and must be paid legal mileage for necessary travel." N.D.C.C. ? 50-01-08.

The county social service board may determine what is "necessary travel" under N.D.C.C. ? 50-01-08. It appears to have been the practice to reimburse members of the county welfare board (now known as the county social service board, see N.D.C.C. ? 50-01-07.1) for mileage to attend regular meetings of the board. See 1974 N.D. Op. Att'y Gen. 180.

It is my opinion that if the county social service board has determined that its legally qualified members will be reimbursed for travel from their residences to the meeting place, then all members must be reimbursed for such travel, regardless of where the member's physical residence is

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located.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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